ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
REDESIGNATION OF THE 17.7-19.7 GHZ FREQUENCY BAND, BLANKET LICENSING OF EARTH STATIONS IN THE 17.7-20.2 GHZ FREQUENCY BANDS, AND THE ALLOCATION OF ADDITOINAL SPECTRUM IN THE 17.3-17.8 GHZ AND 24.75-25.25 GHZ FREQUENCY BANDS FOR BROADCAST SATELLITE SERVICE USE	)	IB Docket No. 98-172 RM-9005 RM-9818

OPPOSITION OF TELEDESIC LLC

Teledesic LLC hereby opposes the "Petition for Interim Relief" filed on November 2, 1998, by the Fixed Point-to-Point Communications Section, Wireless Communications Division of the Telecommunications Industry Association ("TIA Fixed Section"). Even if the Commission were to overlook the procedural irregularity of the TIA Fixed Section's request,[1] the relief requested would still be unwarranted. There is no "freeze." Furthermore, now that the Commission is in the midst of resolving competing claims to the 17.7-20.2 GHz band, it would be contrary to the public interest

[1] The TIA Fixed Section states that it is filing the Petition for Interim Relief pursuant to Rule 1.41. Yet the TIA Fixed Section captioned the petition as a part of the rulemaking already in progress and served no one — even though satellite and terrestrial interests met to discuss the 18 GHz band plan the day after TIA filed its petition. Under the circumstances, it would perhaps be more

to permit prospective users of those frequencies to claim primary status for new stations that do not conform to the Commission's proposed band plan. The Commission has invoked the same or similar policies in the past, and has been consistently affirmed by the courts for doing so.

I. There Is No Freeze.

Despite the claims of the TIA Fixed Section, there is no "freeze" for the Commission to lift. There is only a statement by the Commission – in a notice of proposed rulemaking -- that anyone who deploys radio facilities in the 18 GHz band before the end of this rulemaking must either deploy in accordance with the Commission's proposed band plan or be prepared to accept secondary status. This simply does not constitute a freeze.

First, the Commission's proposed band plan leaves ample spectrum available for use exclusively by the Fixed Service. Under the Commission's proposed band plan, Fixed Service remains primary or co-primary in 1250 MHz of spectrum, including 600 MHz designated exclusively for FS and another 400 MHz in which the only other authorized stations (Big LEO feeder links) can be counted on two hands. The FS channel pairs at 17.74-18.14 GHz and 19.3-19.7 GHz are virtually unaffected by the Commission's proposal, and these frequencies (800 MHz) are more than adequate to

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appropriate to treat the "petition" as nothing more than an early comment on one paragraph of the NPRM.

accommodate FS growth as long as no party hinders the Commission's speedy adoption of a final Report and Order. Even if one ignores the extensive FS allocations in bands other than 18 GHz, it is difficult to take seriously the contention that providing unfettered access, on a primary basis, to more than half of the 18 GHz band is tantamount to a "freeze."

Furthermore, even in the bands the Commission *did* propose to redesignate, FS deployment is not "frozen." Any FS applicant who absolutely cannot find spectrum elsewhere in the band may obtain a license and deploy a station even in a portion of the band designated exclusively for FSS. Any applicant who does so must necessarily bear the risk that the Commission's proposal will be adopted and the operator will need to relocate. But that risk has existed since at least February 1997, when blanket licensing of satellite earth stations in the 18 GHz band was first requested.[2] The mere fact that Commission action has become more imminent does not convert the language of the NPRM — which by definition adopts no rule — into a "freeze."

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[2] In fact, at least one current terrestrial user of 18 GHz frequencies disclosed this risk to investors in June 1998, several months before the NPRM of which the TIA Fixed Section now complains. OpTel, Inc., Form S-1 Registration Statement (June 5, 1998), at 58. Despite awareness of the risk, this operator and others were permitted to continue deploying stations that the Commission now proposes to "grandfather."

II. The Commission Must Preserve its Policy Options and Treat All Parties Fairly During the Rulemaking.

The TIA Fixed Section argues that the policy announced by the Commission in paragraph 40 of its NPRM may alter the plans of some operators. That is precisely the point. When faced with a spectrum management problem as challenging as the 18 GHz situation, it is only reasonable for the Commission to discourage non-conforming deployment that compounds the problem. It would be self-defeating for the Commission to adopt an approach contrary to that articulated in paragraph 40, because continued FS growth during the rulemaking could then constrain the Commission's policy options for responsible management of the spectrum. The problem facing the Commission, the satellite community, and the FS community today is already significantly harder than it was eighteen months ago, thanks to unconstrained deployment of additional FS stations across most of the band. Certainly it would not serve the public interest for the Commission to permit the 18 GHz environment to deteriorate further during the pendency of this rulemaking.

In addition, it would be naïve not to recognize that a terrestrial station deployed today will be used as a reason to resist a new band plan tomorrow. For eighteen months, satellite licensees waited for an NPRM while FS stations in the 18 GHz band grew at an alarming rate. If the TIA "Petition for Interim Relief" is any indication, we can expect one or more terrestrial interests to fight the Commission's band plan by

referring to the base of installed equipment.[3] The sad fact is that whenever one interest or group of interests benefits from delay, hard choices get even harder. For that reason, the Commission was wise to ensure in paragraph 40 that no potential user of the 18 GHz band will benefit from delay of this rulemaking.

III. Even Hard Freezes Have Been Consistently Upheld in Court.

When it revises its spectrum policies, the Commission often acts to confine the problem before solving it, much as it has done here. It has applied this policy to many different services, from AM radio and low-power TV stations to point-to-point microwave and SMR. Especially when a proposal is pending to reallocate a band, the Commission has recognized that licensing new applicants in accordance with rules that are likely to be superseded in the near future can often undermine the successful and smooth implementation of new rules.

The courts have consistently affirmed the imposition of "hard freezes" — Commission actions which, unlike the language of paragraph 40, completely ban deployment of the stations in question. In *Harvey Radio Laboratories, Inc. v. United States*, 289 F.2d 458 (D.C. Cir. 1961) (Burger, J.), the Commission had imposed a licensing freeze during the pendency of the "Clear Channel proceeding," which addressed

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[3] *See, e.g.*, TIA Petition at 4 (referring to "several thousands of . . . systems" and "thousands of subscribers").

nighttime sharing issues on AM radio bands. The court upheld the freeze, reasoning that:

> The Clear Channel proceeding contemplates the possibility of a fundamental realignment of radio stations on the clear channel frequencies. Accordingly, 'piecemeal' consideration of requests for individual locations on these frequencies might well prejudice the ultimate allocation and defeat the purposes of the program. And the effort invested in a determination of individual proposals might be rendered futile by a contrary disposition of the rule making proceeding -- thus producing even more delay.

Id., at 460.

In subsequent cases, the D.C. Circuit has taken a similarly positive view of freezes imposed by the FCC.[4] These cases reflect the commonsense view that allowing continued deployment under a regulatory scheme that is about to be substantially

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[4] *Kessler v. FCC*, 326 F.2d 673, 684 (D.C. Cir. 1963)(freeze not arbitrary and capricious in light of Commission's rationale that such action was "essential . . . [to] avoid compounding present difficulties with a continual flow of new assignments based upon existing, possibly inadequate, standards."); *Neighborhood TV Company, Inc. v. FCC*, 742 F.2d 629, 637 (1984) (interim procedures limiting television translator licenses during pendency of low power television rulemaking justified because the FCC had a "strong interest in preparing for timely implementation of the low power television service, and in assuring that grants of traditional translator licenses would not interfere with the future institution of that service"); *Buckeye Cablevision, Inc.*, 438 F.2d 948, 953 (1971) (interim procedures limiting CATV licensing during pendency of CATV rulemaking justified because they were "procedural rules designed to facilitate the Commission's task" and because CATV was experiencing a period of rapid growth).

modified tends to "perpetuate the very problem [the Commission is] seeking to address."[5] It is that commonsense view that should prevail here.

III. Conclusion

For all of the foregoing reasons, the Commission should deny the Petition for Interim Relief or, in the alternative, accept it only as informal comments on the NPRM.

Respectfully submitted,

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5 "Freeze Imposed on Filing of Applications for New AM Daytime Stations," *Public Notice,* 1 F.C.C. Rcd. 1264 (Dec. 12 1984).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Opposition of Teledesic LLC were sent this 9th day of November, 1998, by first-class mail, to the following persons:

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